



Legislative Bulletin.....November 6, 2007

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H.R. 3685—Employment Non-Discrimination Act of 2007

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Order of Business: H.R. 3685 is scheduled to be considered on Tuesday, November 6, 2007, subject to a structured rule ([H.Res. 793](#)) that allows for ten or twenty minutes of debate on three amendments made in order. The rule would waive all points of order against consideration of the bill—except those for PAYGO and earmarks—and would waive all points of order against the bill itself—except that for earmarks. The rule would make in order one motion to recommit (with or without instructions).

Summary: H.R. 3685, the Employment Non-Discrimination Act (ENDA), would prohibit employment discrimination against an individual on the basis of actual or *perceived* sexual orientation by a covered entity (see definitions). For more details on what the bill would do, see the “Detailed Summary” and “Conservative Concerns” sections below.

Detailed Summary of H.R. 3685:

- **Purpose.** ENDA makes “sexual orientation” a protected class status by providing a “comprehensive” federal prohibition of employment discrimination based on an individual’s sexual orientation. Furthermore, ENDA is designed to provide “meaningful and effective” remedies for such employment discrimination, and explicitly invokes “congressional powers, including the powers to enforce the 14th amendment to the Constitution, and to regulate interstate commerce and provide for the general welfare pursuant to section 8 or article I of the Constitution, in order to prohibit employment discrimination on the basis of sexual orientation.”
- **Definitions.** H.R. 3685 defines a covered entity as an employer, employment agency, labor organization or joint labor-management committee. Employee is defined as any Presidential appointee, state employee, employee who falls under the Congressional Accountability Act of 1995 (this includes congressional staff), or any employee who falls under the Civil Rights Act of 1964. Makes an exception for an individual who is a volunteer and receives no compensation; yet H.R. 3685 fails to define compensation,

raising concerns among some that organizations, such as the boy scouts, would not be exempt from ENDA.

H.R. 3685 defines employer as an individual with at least 15 employees, an individual who qualifies as an employer under the Government Employee Rights Act of 1991, an employing office as defined by the Congressional Accountability Act of 1995 (i.e. a Congressional office), or any employer to whom the Civil Rights Act of 1964 applies.

H.R. 3685 provides the following definition for religious organization, and provides exemptions for the following: “a religious corporation, association, or society”; “a school, college, university, or other educational institution or institution of learning” that “*is in whole or substantial part controlled, managed, owned, or supported by a particular religion, religious corporation, association or society, or the curriculum of the institution is directed toward the propagation of a particular religion*” (emphasis added). Some conservatives may be concerned that this language does not properly address and protect non-denominational religious schools or other organizations from being covered by ENDA. In addition, this language would subject the curriculum of such organizations to review by the courts to determine if the goal of the curriculum is for the propagation of a specific religion.

Note: Representative Hoekstra offered an amendment in the House Education and Labor Committee which would have expanded the religious exemption to include institutions that maintain a faith-based mission. This amendment failed in Committee on a vote of 21-27.

H.R. 3685 defines sexual orientation as “homosexuality, heterosexuality, or bisexuality.”

- **Prohibition of Employment Discrimination.** H.R. 3685 declares that it is unlawful for any employer (or employment agency) to discriminate (as evidenced by the failure or refusal to hire or withhold employee privileges) against any individual on the basis of *actual or perceived sexual orientation*. Furthermore, it prohibits an employer from segregating or classifying any employee or applicant for employment in any way that may adversely affect their status, based on their actual or perceived sexual orientation.

The bill prohibits a labor organization from excluding or expelling from its membership (or otherwise discriminating against) any individual because of their actual or perceived sexual orientation. According to H.R. 3685, discrimination includes segregating, negatively classifying the individual, and doing anything that would limit the employment of the individual. In addition, H.R. 3685 prohibits labor organizations from causing an employer to discriminate against his/her employee based on actual or perceived sexual orientation.

Note: Representative Souder offered an amendment in the House Education and Labor Committee which would have struck ‘perceived’ from the protection against discrimination based on ‘actual or perceived sexual orientation.’ This amendment failed in Committee on a vote of 18-30.

With regard to training programs, H.R. 3685 prohibits discrimination based on the actual or perceived sexual orientations of an employee by an employer, labor organization, or join labor-management committee.

H.R. 3685 states that no preferential treatment or quotas may be permitted to grant preferential treatment to any individual on the basis of the actual or perceived sexual orientation of an individual. In addition, H.R. 3685 states that only disparate (unequal) treatment claims may be brought under this Act. Some conservatives may be concerned that while the bill specifically states that no quotas be permitted, evidence of companies currently employing quotas would indicate that such actions are often done informally to protect such companies from accusations of discrimination.

- **Prohibition of Retaliation.** H.R. 3685 stipulates that an employee who submits a complaint with their employer about an alleged ENDA violation is protected from any retaliatory action by their employer. Some conservatives may be concerned that while protection for outing discrimination may be necessary, the same protection should be afforded those whose personal or moral beliefs are being challenged due to such actions.

Note: Representative Souder offered an amendment in the House Education and Labor Committee which would have provided protection for someone who “refused to express or provide written or oral consent to a covered entity’s anti-discrimination or anti-harassment policy, or refused to participate in a covered entity’s diversity training program, because such policy or program imposes a substantial burden upon the individual’s sincerely held religious beliefs regarding sexual orientation.” This amendment failed in Committee on a vote of 19-29.

- **Religious Organizations Exemption.** H.R. 3685 states that this Act does not apply to a religious organization (see above for definition of religious organization). Some conservatives may be concerned that this exemption is not nearly comprehensive enough to cover non-denomination religious organizations that will remain subject to ENDA due to this weak religious exemption.
- **Non-Application to the Armed Forces and Veterans.** H.R. 3685 clarifies that the term “employment” does not apply to individuals who are members of the U.S. Armed Forces (therefore, the DOD is not covered by ENDA). In addition, the bill clarifies that nothing in the Act will repeal or modify any federal, state, territorial, or local law which currently supports special rights concerning the employment of a veteran.
- **Construction.** The bill states that nothing in the Act is meant to prohibit “a covered entity from enforcing rules and policies that do not intentionally circumvent the purposes of this Act, if the rules or policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation.”

H.R. 3685 states that nothing in the Act should be construed to limit a covered entity from taking action against an individual based on a charge of sexual harassment, so long

as the rules regarding such actions are equally applied to all employees, regardless of actual or perceived sexual orientation.

- **Marriage Provision.** H.R. 3685 states that in any state where same-sex marriage is not legal, employment choices made by a covered entity, based on the individual's marriage preference, status and/or actual or perceived sexual orientation, is unlawful. In other words, an employment decision can not be made with consideration of the individual's marital status or preference. Some conservatives may be concerned that this undermines marriage laws as well as unnecessarily disallows nondenominational religious organizations the right to a marital preference when hiring employees.

Note: Representative Souder offered an amendment in the House Education and Labor Committee which would have permitted employers to condition employment on being married or being eligible to marry. This amendment failed in Committee on a vote of 18-30.

H.R. 3685 clarifies that nothing in the Act would require that a covered entity provide marital benefits to a couple who are not married (including a same-sex marriage).

- **Statistics Collection.** H.R. 3685 prohibits covered entities from collecting statistics on actual or perceived sexual orientation.
- **Enforcement.** H.R. 3685 declares that the Equal Employment Opportunity Commission (Commission) reserves the right to enforce the powers instituted in this bill as they currently do under specified provisions of the Civil Rights Act of 1964 and the Government Employee Rights Act of 1991. In addition, H.R. 3685 grants the Librarian of Congress, the Attorney General, and U.S. courts the same enforcement powers as they have under specified provisions of the Civil Rights Act of 1964, the Government Employee Rights Act of 1991, and other specified laws. H.R. 3685 states that any and all procedures and remedies applicable to a claim alleged by an individual for a violation of this Act are the same as those provided in specified provisions of the Civil Rights Act of 1964, the Government Employee Rights Act of 1991, and other specified laws.
- **State and Federal Immunity.** H.R. 3685 authorizes federal civil damage actions against state entities, which some conservatives may be concerned violates a states' immunity under the Eleventh Amendment to the U.S. Constitution. H.R. 3685 makes it possible to collect punitive damages from both the state and the federal government.
- **Attorneys' Fees.** The bill allows the successful party in a suit to request a "reasonable" attorney's fee and to include any "expert witness" costs.
- **Posting Notices.** The bill requires that all applicable covered entities post notices for employees, applicants, and members who would be affected by any change in law affected by this Act, pursuant to the Civil Rights Act of 1964.

- **Regulations.** The bill grants the Equal Employment Opportunity Commission the authority to issue regulations under this Act to all but Library of Congress employees, Congressional employees, and federal employees (that authority rests with the Librarian of Congress, the Board specified by the Congressional Accountability Act, or the President, respectively).
- **Relationship to Other Laws.** H.R. 3685 states, “This Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or regulation or any law or regulation of a State or political subdivision of a State.”
- **Severability.** No provision in the bill held unconstitutional would affect the remainder of the bill’s validity.
- **Effective Date.** The Act would take effect six months after the date of enactment, and would not apply retroactively to conduct occurring before enactment.

Amendments Made in Order:

1. Miller (D-CA): The amendment provides that any religious corporation, school, association or society that is exempt under Title VII’s religious exemptions is exempt under ENDA. In addition, the amendment clarifies that if a school is exempt from Title VII’s religious discrimination prohibitions, it will also be exempt from ENDA. The amendment also requires that ENDA may have no effect on the Defense of Marriage Act (DOMA). To do this, the amendment strikes language referencing “a same-sex couple who are not married” and inserts language clarifying that the term “married” has the meaning given in DOMA, purposely incorporating DOMA’s definition of marriage into the bill.

2. Souder (R-IN). The amendment would strike the provision which prohibits employers from considering marital status for employment.

3. Baldwin (D-WI). The amendment would insert ‘gender identity’ everywhere in the bill where “sexual orientation” currently exists. ‘Gender identity’ is defined as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.” In addition, the amendment contains language concerning shared facilities, dress, and grooming standards, and a statement that clarifies that the construction of additional facilities for these employees are not required under ENDA.

Conservative Concerns: The following are *some* concerns that many conservatives have expressed with H.R. 3685:

- **Perceived Sexual Orientation.** ENDA expands civil rights protections on the basis of perceived sexual orientation. However, “perceived” is not defined in the bill, and therefore, any individual with any sexual orientation can file suit accusing the hiring organization of discrimination due to how they may or may not have perceived the

individual's sexual orientation. Despite the strong opposition by most conservatives, hate crime legislation passed the House earlier this year. Much like hate crime legislation, ENDA could also incite the practice of thought policing by the federal government.

- **Vague Religious Exemption.** The religious exemptions in H.R. 3685 do not appropriately protect nondenominational religious organizations from being subject to ENDA. For example, certain colleges and universities (i.e. Gordon College, Wheaton College), or nondenominational organizations (such as a Christian counseling centers) would be required to comply with ENDA law under the overly broad and vague religious exemption language in the bill. In the case of a college or university that is not “controlled, managed, owned or supported by a religion,” as would be the case for both Gordon and Wheaton, it would be left to the courts to decide if their curriculum is directed toward the propagation of a religion. This opens such organizations up to endless litigation, and restricts their religious freedoms to make hiring decisions based upon moral or religious grounds.

The American Association of Christian Colleges and Seminaries, Inc. sent a letter to Chairman Miller and Ranking Member McKeon stating the following:

The bill does exempt institutions in which the curriculum is “directed toward the propagation of a particular religion.” The American Association of Christian Colleges and Seminaries sees practical and philosophical problems with this portion of the definition. From a practical standpoint, our schools that are not directly associated with a church are at risk. First, it is not clear that our preparatory schools associated with religious liberal arts colleges would be covered under this exemption. Second, it appears that there may be inadequate protections for our Christian liberal arts universities which are not denominationally aligned. The language of the exemption leaves a substantial loophole for litigants to bring suits against religious schools regarding employment practices ... Section 3(a)(8)(ii) would invite the courts to examine the beliefs and practices of religious schools to determine the degree of religiousness. Philosophically, this aspect of the bill is deeply troubling because it infringes on the ability of religious schools to exercise their religious beliefs free from government intrusion.

- **Creates a New Protected Class Status.** ENDA would overturn the historical basis of protected class status by adding “sexual orientation” to civil rights law. Other federally protected classes (race, gender, ethnicity) are determined by the following criteria:
 - An obvious, immutable (i.e. undeniable) characteristic;
 - A history of discrimination evidenced by economic disenfranchisement; and
 - Political powerlessness.

Arguably, “sexual orientation” does not meet all—if any—of these criteria. Therefore, some conservatives may be concerned that adding them to a category which currently contains race, gender and ethnicity, would set a new and dangerous precedent.

- **Increased Litigation.** Due to the way that the bill is written, both with the overly broad and vague religious exemption language and other similar provisions, the only way to interpret this bill would be through litigation. For instance, the word “perceived” is not

defined in the legislation and therefore leaves it open for individuals to file lawsuits based on what an employee believes an employer perceived him or her to be.

- **Retaliation Provision.** ENDA contains a retaliation provision that protects only those individuals who claim discrimination on the basis of sexual orientation, but not those who are retaliated against because of their beliefs about sexual orientation (be they religious reasons or other). Unfortunately, the bill only prevents discrimination for one group while allowing for increased discrimination of another.
- **Undermines Marriage.** ENDA undermines the institution of marriage by including a provision which states that organizations cannot use marriage as a valid qualification for employment. In practical terms, this would prevent a boys/girls home from specifying that a requirement for employment as the house parents be that the applicants be a married couple.
- **Interference with the Free Market.** Even according to the bill's supporters, 94% of Fortune 500 companies already employ laws similar to ENDA in their hiring practices. Some conservatives may be concerned that it is not the role of the federal government to mandate similar laws for the rest of them.
- **Hostile Work Environment.** Some are concerned that a hostile work environment may be legally construed as discrimination under H.R. 3685, opening the door to lawsuits against employees whose speech or actions (i.e. having a Bible at their desk) may be interpreted as discrimination.
- **Current State Laws Already Exist.** Currently, 28 states have ENDA-type laws providing discrimination protections for sexual orientation in public employment, and 21 states provide such protections for private employment. Some conservatives may argue that it is unnecessary for the federal government to create a mandate affecting all 50 states, when only half currently impose such protections.

Committee Action: The original version of ENDA, H.R. 2015, was introduced April 24, 2007 and included Rep. Franks original "sexual orientation or gender identity" language. H.R. 2015 was referred to the Committee on Education and Labor, and a Subcommittee hearing was held. After facing opposition from numerous organizations and Members regarding the "gender identity" language (as well as numerous other concerns), Mr. Franks introduced H.R. 3685 on September 27, 2007, which removed the term "gender identify" and made a few other technical and cosmetic changes. H.R. 3685 was referred to the Committee on Education and Labor, as well as to the Committees on House Administration, Oversight and Government Reform, and the Judiciary. The Committee on Education and Labor held a mark-up of the bill on October 18, 2007 and ordered the bill reported by a vote of 27-21.

Administration Position: The Administration is opposed to H.R. 3685 and released the following statement regarding the President's likely veto:

H.R. 3685 would extend existing employment-discrimination provisions of Federal law, including those in Title VII of the Civil Rights Act of 1964, to establish "a

comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation.” The bill raises concerns on constitutional and policy grounds, and if H.R. 3685 were presented to the President, his senior advisors would recommend that he veto the bill.

H.R. 3685 is inconsistent with the right to the free exercise of religion as codified by Congress in the Religious Freedom Restoration Act (RFRA). The Act prohibits the Federal Government from substantially burdening the free exercise of religion except for compelling reasons, and then only in the least restrictive manner possible. H.R. 3685 does not meet this standard. For instance, schools that are owned by or directed toward a particular religion are exempted by the bill; but those that emphasize religious principles broadly will find their religious liberties burdened by H.R. 3685.

A second concern is H.R. 3685’s authorization of Federal civil damage actions against State entities, which may violate States’ immunity under the Eleventh Amendment to the U.S. Constitution.

The bill turns on imprecise and subjective terms that would make interpretation, compliance, and enforcement extremely difficult. For instance, the bill establishes liability for acting on “perceived” sexual orientation, or “association” with individuals of a particular sexual orientation. If passed, H.R. 3685 is virtually certain to encourage burdensome litigation beyond the cases that the bill is intended to reach.

Provisions of this bill purport to give Federal statutory significance to same-sex marriage rights under State law. These provisions conflict with the Defense of Marriage Act, which defines marriage as the legal union between one man and one woman. The Administration strongly opposes any attempt to weaken this law, which is vital to defending the sanctity of marriage.

Cost to Taxpayers: According to CBO cost estimates, H.R. 3685 would cost \$28 million over FY 2008-2012 for the Equal Employment Opportunity Commission (EEOC) to handle additional discrimination cases. The bill could affect direct spending, but CBO estimates that any such effects would be less than \$500,000 annually. CBO estimates that H.R. 3685 would not affect revenues.

Does the Bill Expand the Size and Scope of the Federal Government? Yes, H.R. 3685 would extend existing employment-discrimination provisions of federal law to establish “a comprehensive federal prohibition of employment discrimination on the basis of sexual orientation.”

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes, H.R. 3685 would require that covered entities (including private businesses and state employees), pursuant to the Civil Rights Act of 1964, prohibit discrimination of employees and applicants for eligibility based on their actual or perceived sexual orientation. In addition, H.R. 3685 would require affected organizations to post notices regarding such discrimination prohibitions. H.R. 3685 would also impose a number of mandates on private-sector employers, employment agencies, and labor organizations, but CBO estimates that the direct cost of those requirements would not exceed the annual threshold specified in UMRA

(\$131 million in 2007, adjusted annually for inflation) in any of the first five years the mandates would be effective.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits? According to the House Committee on Education and Labor [House Report 110-406](#), “H.R. 3685 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI.”

Constitutional Authority: According to the House Committee on Education and Labor [House Report 110-406](#), “Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 3685. Congress has the authority to enact ENDA through the Commerce Clause, the Fourteenth Amendment of the United States Constitution. The Act’s authorization of individual suits against state governmental employers is derived from Congress’ enforcement power under Section 5 of the Fourteenth Amendment as well as Congress’ Spending Power under Article 1.”

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